95-1684

No. _____

Supreme Court, U.S.
FILED
APR 17 1996
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

*In re* MELKA MARINE, INC.,

*Petitioner.*

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**PETITION FOR AN EXTRAORDINARY WRIT**

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Peter Paul Mitrano
6 Stevens Road
Hanover, New Hampshire 03755
(603) 643-0456

Counsel for Petitioner

51 pp

## QUESTION PRESENTED

1. Should an extraordinary writ of mandamus be issued to the Supreme Court of Virginia to hear the appeal of Melka Marine, Inc. where the Supreme Court of Virginia dismissed said appeal on grounds that are contrary to its own precedent?

## TABLE OF CONTENTS

Question Presented . . . . . i

Opinion Below . . . . . 1

Jurisdiction . . . . . 2

Statement of the Case . . . . . 3

Argument . . . . . 6

Conclusion . . . . . 16

Appendices . . . . . A-1

Opinion of the Supreme Court of Virginia . . . . . A-1

Opinion of the Trial Court . . . . . A-3

Order of the Supreme Court of Virginia . . . . . A-26

## TABLE OF AUTHORITIES

**Cases:**

*Blowe v. Peyton*, 208 Va. 68, 155 S.E.2d 351 (1967) . . . . . 13

*City of Richmond v. Randall*, 215 Va. 506, 211 S.E.2d 56 (1975) . . . . . 15

*Fox v. Curtis*, 236 Va. 69, 372 S.E.2d 373 (1988) . . . . . 9

*Hyman v. Commonwealth*, 206 Va. 891, 147 S.E.2d 156 (1966) . . . . . 13

*Lamb v. Commonwealth*, 222 Va. 161, 279 S.E.2d 389 (1981) . . . . . .7

*Raintree of Albemarle Homeowners v. Jones*, 243 Va. 155, 413 S.E.2d 340 (1992) . . . . . 14

*Roe v. Roe*, 228 Va. 722, 324 S.E.2d 691 (1985). . . . . 13, 14

Smyth v. Midgett, 199 Va. 727, 101 S.E.2d 575 (1958) . . . . . 13, 14

*Smyth v. Morrison*, 200 Va. 728, 107 S. E.2d 430 (1959) . . . . . 13

*Talkington v. Barnhart*, 164 W.Va. 488, 264 S.E.2d 450 (1980) . . . . . 10, 11

*Towler v. Commonwealth*, 216 Va. 533, 221 S.E.2d 119 (1976) . . . . . 9

*Turner v. Holloway*, 146 Va. 827, 132 S.E. 685 (1926) . . . . . 15

*White v. Morano*, Va., 452 S.E.2d 856 (1995) . . . . . 8

**Other Authorities**:

28 U.S.C., Section 1651(a) . . . . . 2

Section 8.01-679 of the Code of Virginia. . . . . .8

Rule 5:5 of the Rules of Virginia Supreme Court . . . . . .11, 12

Rule 5:9(a) of the Rules of Virginia Supreme Court . . . . . .12

Rule 5:9(b) of the Rules of Virginia Supreme Court (1973 version) . . . . . 6

Rule 5:11 of the Rules of Virginia Supreme Court . . . . . 7, 8, 12, 14

Rule 5:11(a) of the Rules of Virginia Supreme Court . . . . . 5, 6, 9

Rule 5:11(b) of the Rules of Virginia Supreme Court . . . . . 5, 6, 7, 12

Rule 5:11(d) of the Rules of Virginia Supreme Court . . . . . 8

Rule 5:14(a) of the Rules of Virginia Supreme Court . . . . . 12

Rule 5:17(a) of the Rules of Virginia Supreme Court . . . . . 12

Rule 5:20) of the Rules of Virginia Supreme Court . . . . . 12

Rule 5:21(c) of the Rules of Virginia Supreme Court . . . . . 12

Rule 5:21(g) of the Rules of Virginia Supreme Court . . . . . 12

Rule 5:39 of the Rules of Virginia Supreme Court . . . . . 12

Rule 61 of the West Virginia Rules of Civil Procedure . . . . . 11

Rule 80(c) of the West Virginia
Rules of Civil Procedure . . . . . .11

Civil Procedure and Practice 19
U. Rich. L. Rev. 679 (1985) . . . . . 7

No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

*In re* MELKA MARINE, INC.

*Petitioner,*

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## PETITION FOR AN EXTRAORDINARY WRIT

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### OPINION BELOW

The petitioner[1] seeks a petition for an extraordinary writ from a judgment of the Supreme Court of Virginia which appears in the Appendix hereto at page A-1. The subsequent Order issued by the Supreme Court of Virginia denying the petitioner's petition for rehearing appears in the Appendix hereto at page A-26.

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1. Melka Marine, Inc. is not a subsidiary or affiliate of any other company.

The Judgment Order together with the attached letter opinion of the trial court also appears in the Appendix hereto at page A-3.

## JURISDICTION

The judgment of the Supreme Court of Virginia was entered on November 17, 1995. A timely petition for rehearing was filed on December 1, 1995; an Order denying the petition for rehearing was entered on January 19, 1996. This petition for an extraordinary writ was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1651(a). The petitioner has also filed this date a petition for writ of certiorari from the Supreme Court of Virginia. Petitioner respectfully requests that this Supreme Court of the United States issue a writ of mandamus to the Supreme Court of Virginia to hear the appeal of Melka Marine, Inc., that was dismissed on November 17, 1995. The granting of this writ will be an aid to this Supreme Court of the United States in that the same will not required this Supreme Court of the United States to grant the petition for writ of

certiorari from the Supreme Court of Virginia filed this date. The denial of petitioner's rights to due process warrant the exercise of this Supreme Court's discretionary powers. The petitioner believes that adequate relief cannot be obtained in any other form or from any other court.

## STATEMENT OF THE CASE

This action arises from a construction contract wherein the Town of Colonial Beach failed to pay monies due to Melka Marine, Inc. The jury heard the issues of whether the Town was required to pay the contract balance and attorney's fees pursuant to the contract and also whether Melka Marine, Inc. was liable for various counterclaims asserted by the Town. The jury found that the Town was liable to Melka Marine, Inc. for the contract balance and attorney's fees and that Melka Marine, Inc. was not liable to the Town for any of the Town's counterclaims against Melka Marine, Inc. After the jury rendered a verdict on April 17, 1995, the trial court entered judgment for Melka Marine, Inc. for the entire contract balance.

Surprisingly, the trial court set aside the jury's award for attorney's fees and entered judgment for zero dollars for attorney fees for Melka Marine, Inc. even though the jury found Melka Marine, Inc. entitled to attorney's fees. The Town's motion to strike award of attorney's fees after the jury rendered a verdict for attorney's fees was in effect a motion for judgment not withstanding the verdict.

The trial court also assessed sanctions against Melka Marine, Inc. and its counsel, Peter Paul Mitrano, in the sum of $30,000.00 without an evidentiary hearing through a letter dated May 24, 1995 and received by the Town on June 5, 1995. One of the reasons given for the sanctions that were assessed against Peter Paul Mitrano involved an incident where the Town's attorney was kicking a witness under the table during a deposition. Because there was not an evidentiary hearing related to said sanctions, there is no requirement for the transcript to be part of the record in order for the Supreme Court of Virginia to consider the assignment of error related to said sanctions. The petitioner contends that the trial court clearly committed error

in assessing sanctions in the sum of $30,000.00. It would be a grave injustice and denial of due process to allow said sanctions to stand. Melka Marine, Inc. refers to its petition for writ of certiorari from the Supreme Court of Virginia filed this date for additional background as to this action. On November 17, 1995, the Supreme Court of Virginia dismissed the appeal of Melka Marine, Inc. stating:

> "Finding that the appeal was not perfected in the manner provided by law the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:11(b)."

Melka Marine, Inc. contends that when certain parts of the transcript were filed in the clerk's office of the trial court in accordance with Rule 5:11(a)of the Rules of Virginia Supreme Court, said transcript became part of the record.

Melka Marine, Inc. also took the position before the Supreme Court of Virginia that arguendo, even if the Supreme Court of Virginia were not to allow said transcript to be utilized in the appeal, the Supreme Court of Virginia was still able to consider the appeal based upon the

record from the trial court. As Melka Marine, Inc. advised the Supreme Court of Virginia, the dismissal of petitioner's appeal before the Supreme Court of Virginia is too harsh a sanction and contrary to the interest of justice.

## ARGUMENT

Melka Marine, Inc. timely filed an appeal before the Supreme Court of Virginia. Melka Marine, Inc. also timely filed certain transcripts with the office of the clerk of the trial court on August 22, 1995. The Supreme Court of Virginia dismissed Melka Marine's appeal based upon Rule 5:11(b) of the Rules of Virginia Supreme Court. The petitioner will first address the issue of whether said transcripts became part of the record and then address the issue of whether the Supreme Court of Virginia properly dismissed petitioner's appeal.

The petitioner contends that in accordance with Rule 5:11(a), the transcripts became part of the record when the transcripts were filed in the office of the clerk of the trial clerk within 60 days after entry of judgment. Rule 5:11(a) states:

> "(a) Transcript. -- The transcript of any proceeding is a part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of judgment."

Hence, when the petitioner filed the transcript in the office of the clerk of the trial court, the transcript became part of the record. The petitioner also refers to the law review article "Civil Procedure and Practice" 19 U. Rich. L. Rev. 679, 695 (1985) wherein Professor Bryson stated:

> "The most important change is in making a transcript a part of the record. Rule 5:11 provides that this is Bone simply by filing the transcript in the office of the clerk of the circuit court. Filing must occur within sixty days after the entry of the final order ...." (Emphasis added.)

The purpose of Rule 5:ll(b) is to allow for the correction of errors to the transcript. Rule 5:11 is not the only procedure for correcting errors in the transcript. *Lamb v. Commonwealth*, 222 Va. 161, 279 S.E.2d 389 (1981). Counsel for the Town was provided written notice of the filing of the transcript via telecopier on August 31, 1995, four days after the five days provided for in Rule 5:ll(b)

or two days after the time provided if Saturday and Sunday are excluded. The Town has not even suggested that the Town was prejudiced by receiving the notice of filing the transcript on August 31, 1995. Moreover, the Town did not file any objections to the transcript. Arguendo, even if the Town had filed objections to the transcript, and further even if the trial court filed the record late, there still would not been grounds for dismissing the appeal before the Supreme Court of Virginia. See Section 8.01-679 of the Code of Virginia which states that "no appeal shall be refused or dismissed for failure to deliver the record within the required time." Furthermore, the Supreme Court of Virginia recently decided in *White v. Morano*, Va., 452 S.E.2d 856 (1995) that the word "shall" in subparagraph (d) in Rule 5:11 is directory in meaning and not mandatory; the Supreme Court of Virginia stated that:

> "Use of the word `shall' in paragraph (d) is merely directory in meaning and not mandatory. Courts endeavoring to arrive at the meaning of language in statutes and procedural rules often are compelled to construe `shall' as permissive in

> accordance with the subject matter. Fox v. Curtis, 236 Va. 69, 77, 372 S.E.2d 373, 377 (1988)." *Id.*, at 452 S.E.2d 859.

Under the former Rule 5:9(b) which differs from the present Rule 5:11(a) in that the former Rule 5:9(b) required the notice of filing the transcript to be filed in order for the transcript to become part of the record, the Supreme Court of Virginia decided *Towler v. Commonwealth*, 216 Va. 533, 221 S.E.2d 119 (1976). It is important to realize that *Towler* was predicated upon the former Rule 5:9(b) of the Rules of Virginia Supreme Court which required a notice to be accompanied by the transcript in order for the transcript to become part of the record. Please note that the current Rule 5:11(a) of the Rules of Virginia Supreme Court differs from the language of the former Rule 5:9(b) of the Rules of Virginia Supreme Court and does not require a notice to accompany the transcript in order for the transcript to become part of the record. The former Rule 5:9(b) of the Rules of Virginia Supreme Court upon which the decision in *Towler v. Commonwealth*, supra, was decided stated:

> "(b) The transcript of any hearing also becomes a part of the record when it is filed in the office of the clerk within sixty days after entry of final judgment and is accompanied by a notice identifying the transcript and reciting its delivery to the clerk, to which is appended a certificate that a copy of the notice has been mailed to opposing counsel or acceptance of service of such notice by opposing counsel."

The Supreme Court of West Virginia has addressed the issue of the notice of filing of the transcript. See *Talkington v. Barnhart*, 164 W.Va. 488, 264 S.E.2d 450 (1980) wherein the Supreme Court of West Virginia stated the intent of the West Virginia Rules of Civil Procedure was to avoid "placing form over substance" and held that the failure to give notice of the filing of a transcript will be deemed a harmless error under their rules unless the other party can show actual prejudice affecting substantial rights. In *Talkington v. Barnhart, supra*, the court stated:

> "Defendant moved that we dismiss the appeal He argued that plaintiffs' counsel's failure to notify him that the trial transcript had been made

> part of the record as required by West Virginia Rules of Civil Procedure, Rule 80(c), precludes us from reviewing the testimony to determine the merits of the appeal. We do not grant the motion ... We modify Syllabus Point 3: '[i]n the interpretation and application of Rule 80(c) of the West Virginia Rules of Civil Procedure, the function and purpose thereof must be considered' but failure to comply with the rule will be deemed harmless under Rule 61 unless a party can show actual prejudice effecting substantial rights." *Id.*, at 264 S.E.2d 451.

Rule 80(c) of the West Virginia Rules of Civil Procedure as quoted in *Talkington v. Barnhart*, supra, stated:

> "(c) Notice of filing transcript.-- When a transcript of the proceedings had and testimony taken at a trial is filed with the court, the party causing it to be filed shall promptly give notice thereof to all other parties." *Id.*, at 264 S.E.2d 452.

Furthermore, Rule 5:5 of the Rules of Virginia Supreme Court specifically lists the times which are mandatory as follows:

> "The times prescribed for filing the notice of appeal (Rules 5:9(a), 5:14(a) and 5:21(c)), the transcript or written statement (Rule 5:11), a petition for appeal (Rules 5:17(a) and 5:21(g)) and a petition for rehearing (Rule 5:20 and 5:39), are mandatory."

Note that the above-quoted Rule 5:5 does not state that the time for filing the notice of filing of the transcript is mandatory.

Melka Marine contends that the Supreme Court of Virginia should have decided Melka Marine's appeal on the merits and should not have dismissed the appeal for failing to strictly adhere to the five-day rule in Rule 5:ll(b) especially when the Town was not prejudiced.

The second issue is, arguendo, the Supreme Court of Virginia should still not have dismissed the appeal because the record is sufficient for the Supreme Court of Virginia to decide this appeal without said transcript. The Supreme Court of Virginia has repeatedly held that when the record is sufficient to decide the issues raised on appeal even without a transcript, the Supreme Court opponents should decide the appeal on the merits and not dismiss the appeal. For example, in

*Smyth v. Midgett*, 199 Va. 727, 729, 101 S.E.2d 575, 578 (1958), the Supreme Court of Virginia overruled a motion to dismiss and stated:

> ". . . But this Court will consider any question of law properly raised as to matters appearing on the face of the record. In this case the record consists of the pleadings, exhibits filed therewith and the orders of the lower court, which record is sufficient for the Court to pass on the question of law raised by respondent. . . ."

In *Smyth v. Morrison*, 200 Va. 728, 107 S. E.2d 430, 432 (1959), the Supreme Court of Virginia overruled a motion to dismiss and stated:

> ". . .It thus appears that the proceedings in that court were based solely upon matters of law. The writ of error, therefore, presents only questions of law. Such of these as were properly raised as to matters appearing on the face of the record we are required to determine."

Also see *Hyman v. Commonwealth*, 206 Va. 891, 147 S.E.2d 156 (1966); *Blowe v. Peyton*, 208 Va. 68, 155 S.E.2d 351 (1967); *Roe v. Roe*, 228 Va.

722, 725, 324 S.E.2d 691, 692 (1985). Even in a fairly recent decision, this Court held in *Raintree of Albemarle Homeowners v. Jones*, 243 Va. 155, 157, 413 S.E.2d 340, 341 (1992), that an appeal should not be dismissed even though the appellant failed to file a transcript when the record was sufficient for this Court to consider the legal issues raised in the appeal and stated that:

> "Citing Rule 5:11, Charles and Glenda Jones contend that the Homeowners Association's appeal should be dismissed because it failed to file a transcript with this Court. We disagree. In this case, the record consists of the pleadings, exhibits filed during the ore tenus hearing, orders of the trial court and its letter opinion. Even though the Homeowners Association did not file a transcript of the ore tenus hearing, the findings of fact upon which the chancellor relied are contained in his opinion. Therefore, we hold that the record is sufficient to permit this Court to consider the legal questions raised in this appeal. See Smyth v. Midgett, 199 Va. 727, 729, 101 S.E.2d 575, 578 (1958)."

In *City of Richmond v. Randall*, 215 Va. 506, 508, 211 S.E.2d 56, 58 (1975), the Supreme Court of Virginia overruled a motion to dismiss an appeal based upon the trial judge's refusal to certify a statement of facts and stated:

> "...Since we find that record sufficient for adjudication of the issues presented, we overrule landowner's motion."

Also see *Turner v. Holloway*, 146 Va. 827, 132 S.E. 685 (1926). Melka Marine contends that even without the transcripts filed in the record before the Supreme Court of Virginia, a review of Petition for Appeal of petitioner dated September 23, 1995 and the record before the Supreme Court of Virginia will clearly show that the record is sufficient for the Supreme Court of Virginia to consider the legal issues raised in Melka Marine's appeal.

As a result of the Supreme Court of Virginia dismissing the appeal of Melka Marine, Inc. for a reason that is not in accord with the precedent of the Supreme Court of Virginia and further as a result of the Supreme Court of

Virginia denying Melka Marine's petition for rehearing, Melka Marine respectfully request that this Supreme Court of the United States issue a writ of mandamus to the Supreme Court of Virginia to hear the appeal of Melka Marine, Inc. Please note that Melka Marine has exhausted its available remedies with the Virginia Supreme Court.

## CONCLUSION

For these reasons, an extraordinary writ should be issued by this Supreme Court of the United States.

Respectfully submitted,

Peter Paul Mitrano
6 Stevens Road
Hanover, New Hampshire 03755
(603) 643-0456

Counsel for Petitioner

April 16, 1996

# APPENDIX

## SUPREME COURT OF VIRGINIA

## No. 951741

Melka Marine, Inc.,

Appellant,

versus

Town of Colonial Beach,

Appellee.

Date of Entry: November 17, 1995

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## JUDGMENT

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VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Friday *the* 17 th *day of* November, 1995.

Melka Marine, Inc.,

Appellant,

against Record No. 951741

Circuit Court No. L94-6

Town of Colonial Beach,

Appellee.

From the Circuit Court of Westmoreland County

Finding that the appeal was not perfected in the manner provided by law, the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:11(b).

A Copy,

Teste:

David B. Beach, Clerk

By: /s/
Deputy Clerk

A-3

ORDER FROM THE TRIAL COURT IN
WESTMORELAND COUNTY, VIRGINIA

---

VIRGINIA:

CIRCUIT COURT OF WESTMORELAND COUNTY

| | | |
|---|---|---|
| MELKA MARINE, INC., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | At Law No. 94-6 |
| | ) | |
| THE TOWN OF COLONIAL BEACH<br>A Municipal Corporation, | ) | |
| | ) | |
| Defendant. | ) | |

Date of Entry: June 23, 1995

**JUDGMENT ORDER**

This cause came before the Court for trial by jury on the Motion for Judgment of Melka Marine, Inc. ("Melka") and the Amended Counterclaim of the Town of Colonial Beach ("the Town") on April 14 and 17, 1995. At the close of the evidence, the Court took under advisement the Town's motion to strike Melka's evidence in support of an award of attorney's fees and submitted both the Motion for Judgment and the Amended Counterclaim to

the jury. The jury returned a verdict in favor of Melka on both the Motion for Judgment and the Amended Counterclaim, and awarded as compensatory damages to Melka the contract balance of $64,755.50, plus attorney's fees in the amount of $20,000.00.

Following the verdict, the Town moved pursuant to Virginia Code (Section) 8.01-430 for entry of judgment notwithstanding the verdict, renewed its motion to strike plaintiff's evidence in support of an award of attorney's fees, and further moved for an award of sanctions against Melka and its counsel pursuant to Virginia Code (Section) 8.01-271.1. Melka moved for an award of additional attorney's fees and expenses pursuant to Rule 4:12(c). These motions were heard and argued in open court on May 11, 1995. Melka's motion was denied from the bench, and the Town's motions were taken under advisement. The Court has reviewed and considered the post-trial motions, the memoranda filed both in support and in opposition thereto, the arguments of counsel, and has conducted a thorough review of the evidence at trial and the entire record in this cause. In accordance with the rulings

contained in the Court's letter opinion dated May 24, 1995, a copy of which is attached hereto and incorporated herein, it is hereby

ORDERED:

1. The Town's motion for judgment notwithstanding the verdict is denied.

2. The Town's motion to strike plaintiff's evidence in support of its claim for attorney's fees is granted, and the jury's award of attorney's fees is hereby set aside.

3. The Town's motion for sanctions is granted, and sanctions are hereby awarded in favor of the Town and against Melka and its counsel, Peter Paul Mitrano, jointly and severally, in the amount of $30,000.00.

MONEY JUDGMENTS ENTERED

In accordance with the verdict of the jury, as modified and supplemented by the foregoing orders:

1. Judgment is hereby entered against the Town of Colonial Beach and in favor of Melka Marine, Inc., in the amount of $64,755.50 plus costs in the amount of $86.00. Interest shall accrue thereon at the judgment rate from the date of this order until paid.

2. Judgment is hereby entered against Melka Marine, Inc. and Peter Paul Mitrano, jointly and severally, and in favor of the Town of Colonial Beach, in the amount of $30,000.00. This sum represents the sanctions awarded by the Court herein, and interest shall accrue thereon at the judgment rate from the date of this order until paid.

The Town may, at its option, set off the judgment for sanctions in making payment of the judgment entered in favor of Melka, in satisfaction of both judgments, without prejudice to the appeal rights of any party.

THIS ORDER IS FINAL.

ENTERED this 23rd day of June, 1995.

/s/

Joseph E. Spruill, Jr.

Circuit Court Judge

The plaintiff, Melka Marine, Inc., respectfully hereby states out of an abundance of caution in order that there may be less of a misunderstanding by the defendant and/or by this Court that the plaintiff, Melka Marine, Inc., notes objection to the following rulings and further states that at the present time the

plaintiff, Melka Marine, Inc., intends to appeal each of the following rulings except for those rulings that this Court appropriately amends prior to the entry of a Judgment Order:

1. The award of sanctions in the sum of $30,000.00 against the plaintiff, Melka Marine, Inc., an the basis stated before this Court on May 11, 1995, and on the basis of the written pleadings filed in opposition to said motion for sanctions.

2. The granting of defendant's motion to strike award of attorney's fees on the basis stated before this Court on May 11, 1995, and further on the basis that Rule 1:11 of the Rules of Virginia Supreme Court and/or Section 8.01-276 of the Code of Virginia do not provide for the striking of an award after the jury has rendered its verdict after the Court has allowed the matter to go to the jury; furthermore, defendant's motion to strike award of attorney's fees is in effect another motion for judgment notwithstanding the verdict in which the plaintiff, Melka Marine, Inc., relies upon the case law cited to this Court on May 11, 1995, in opposition to defendant's motion for judgment notwithstanding the verdict;

furthermore, the evidence at trial including the daily time entries for legal services supported at a minimum the award of the jury.

3. The failure of this Court to award the plaintiff, Melka Marine, Inc. the attorney's fees that were supported by time records and the testimony of Peter Paul Mitrano and the testimony of a legal fee expert at the trial; moreover, the expert testimony and the case law provided to this Court support that the plaintiff, Melka Marine, Inc., is entitled to its legal fees for defending the counterclaims of the defendant; furthermore, because there was no evidence presented by defendant which proved that the plaintiff, Melka Marine, Inc., was not entitled to said attorney's fees, the plaintiff, Melka Marine, Inc., is entitled to recover as a matter of law all attorney's fees presented to this court at the trial; furthermore, this court erred in denying plaintiff's jury instructions related to attorney's fees.

4. The failure of this Court to award the plaintiff, Melka Marine, Inc., sanctions against the defendant for filing defendant's motion to disqualify plaintiff's attorney.

5. The failure of this Court to award the plaintiff, Melka Marine, Inc., attorney's fees and expenses pursuant to Rule 4:12(c); this Court's reason that the matters stated in the requests for admission were in genuine dispute is an incorrect basis for denying the plaintiff, Melka Marine, Inc., said attorney's fees and expenses.

6. The granting of defendant's motion for partial summary judgment denying the plaintiff, Melka Marine, Inc., the additional costs in the sum of $168,879.00 for the reasons stated by the plaintiff, Melka Marine, Inc., in Court and in writing through the pleading filed in opposition to defendant's motion.

7. The denial by this Court of the plaintiff, Melka Marine, Inc.'s motion to vacate order.

8. The granting of the defendant's motion to change venue from Fairfax County to Westmoreland County.

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Peter Paul Mitrano
Virginia Bar No. 17095
Post Office Box 12
Etna, New Hampshire 03750

Attorney for Plaintiff
Melka Marine, Inc.

In addition, Peter Paul Mitrano personally (not as attorney for the plaintiff, Melka Marine, Inc.) respectfully hereby states out of an abundance of caution in order that there may be less of a misunderstanding by the defendant and/or by this Court that Peter Paul Mitrano notes objection to the following ruling and further states that at the present time Peter Paul Mitrano intends to appeal the following ruling unless this Court reverses said ruling prior to the entry of a Judgment Order:

1. The award of sanctions in the sum of $30,000.00 against Peter Paul Mitrano on the basis stated before this Court on May 11, 1995, and on the basis of the written pleadings filed in opposition to said motion for sanctions.

PETER PAUL MITRANO
Post Office Box 12
Etna, New Hampshire 03750
(603) 643-0456

SEEN AND OBJECTED TO AS TO THE VERDICT OF THE JURY ON THE MOTION FOR JUDGMENT AND THE AMENDED COUNTERCLAIM, EXCEPT AS MODIFIED BY THIS ORDER:

MAYS & VALENTINE
110 South Union Street, Suite 200
Alexandria, Virginia 22314
(703) 519-8000

By: /s/
James M. Saunders, VSB # 21067

Counsel for the Town of Colonial Beach

A-12

LETTER FROM THE TRIAL COURT ATTACHED TO THE ABOVE-STATED JUDGMENT ORDER

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Commonwealth of Virginia

FIFTEENTH JUDICIAL CIRCUIT

May 24, 1995

Peter Paul Mitrano, Esquire
Post Office Box 12
Etna, New Hampshire 03750

James M. Saunders, Esquire
Mays & Valentine
110 South Union Street, Suite 200
Alexandria, Virginia 22313-0149

J. Thomas O'Brien, Jr., Esquire
O'Brien & Associates
4801 Radford Avenue, Suite 100
Richmond, Virginia 23230

Re: Melka Marine, Inc. v. Town of Colonial Beach
Circuit Court of Westmoreland County

Gentlemen:

This action for breach of contract was tried before a jury which returned a verdict in favor of the plaintiff, Melka Marine, Inc., against the Town of Colonial Beach, in the amount of $64,755.50, and attorney's fees of $20,000. Following the verdict, the Town moved (1) for judgment notwithstanding the verdict pursuant to Virginia Code (Section)8.01-430; (2) to strike the evidence as to attorney's fees; and (3) for sanctions against Melka and it's (sic) counsel pursuant to Virginia Code (Section) 8.01-271.1. Rulings on these motions follow.

## MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

We have here no significant factual disputes. The issue is one of interpretation of the contract.

In January, 1993, the Town entered into a contract with Melka, wherein Melka agreed to replenish a beach area within the Town with sand for which the Town was to pay Melka $254,406. Various delays attended Melka's work and in the late summer or early fall of 1993 Melka assumed

it had completed its work and left the job. It does not appear that Melka formally notified the Town. By this time, the Town had paid Melka $189,750.49, leaving a balance due under the contract of $64,755.50.

The Town claimed Melka had not completed the contract and refused to pay the balance. In November, 1993, Melka filed this action (claiming, erroneously, that the contract required payment by the Town of $424,340.42.) Melka sought judgment for $234,589.93, representing tile contract balance or $64,775.50 and what it refers to as "additions" of $168.879. The Court at an early stage struck the "additions" claim.

The central issue in dispute is what Melka agreed to do under the contract. Specifically, the Town claimed that Melka agreed to spread sand to the level of certain templates across five zones of approximately 1,600 feet of beach area, as shown on plans and survey drawings which were a part of the contract. Melka claimed that it was only required to furnish and place "14,000 yards of sand".

Melka prepared the contract in question with help from its counsel, Mr. Peter Paul Mitrano,

who is one of three members of its Board of Directors. It is a four page document, with various attachments consisting of letters, bid documents, surveys and drawings from the Army Corps of Engineers, etc. Paragraph 2 of the contract provides:

> Melka Marine Inc. shall furnish and place approximately 14,000 yards of sand . . . . All work to be as per the contract documents.

Paragraph 3 of the contract requires completion by May 1, 1993.

Melka's evidence was that it purchased 18,268 tons of sand between February and August, 1993; that this sand was brought to the contract site and placed; that this amounted to 14,095 cubic yards; and that this is all the contract required of it.

The Town countered that the contract specifically required sand to be placed to the level as designated across all five zones; that the invitation to bid made this clear; that at the meeting of bidders, the representative from the Army Corps of Engineers made this clear; that the plans and surveys were part of the contract and

these made clear the work that was to be accomplished; that Melka's own bid notes reflected that it had calculated it would take 20,000 cubic yards to do the job and it had computed its bid on this basis; that Melka never indicated to the Town at any time that it construed the contract as it now contends; and that, in any event, 18,268 tons (which Melka purchased) does not equate to 14,000 cubic yards.

(This latter point involves converting tons to cubic yards. There was no agreement among the experts as to how to do this.)

The authority conferred by Virginia Code (Section) 8.01-430 upon a trial court to set aside a jury verdict and enter judgment thereon can only be exercised where the verdict is plainly wrong or without credible evidence to support it. If the conclusion is dependent on the weight to be given the testimony, the trial judge cannot substitute his conclusion for that of the jury merely because he would have voted for a different verdict if he had been on the jury. Lane v. Scott, 220 Va. 578 (1979); Carter v. Lambert, 246 Va. 309 (1993).

Here the jury apparently accepted the testimony of Melka and ignored or disregarded his bid notes, the contract drawings, and the testimony of witnesses for the Town and the Army Corps of Engineers. This was within the jury's province. The Court cannot say that Melka's testimony is incredible, and that is the standard required. Adhering to the holdings in Lane and Carter, the motion for judgment notwithstanding the verdict is denied.

MOTION TO STRIKE AWARD OF ATTORNEY'S FEES

At trial, Melka's counsel, Mr. Mitrano, took the stand and testified as to his attorney's fees incurred in this litigation. He testified that he charged at the rate of $190.00 per hour and that his fees amounted to $235,000. Mr. Mitrano produced an expert witness, Mr. Michael Doherty, a licensed Virginia attorney from Arlington, who opined that this was a reasonable fee. On cross-examination, Mr. Mitrano conceded that this amount covered all his time devoted to the case, not just the amount of time collecting the contract balance. The contract provides that fees associated with "collection of monies on the

contract" may be recoverable. The fees requested included time devoted by Mr. Mitrano to pursuit of the claim referred to as "additions", which claim was struck at an early stage and was not part of the contract sued on. The fees requested also included time devoted to defense of the counterclaim. Further, Mr. Mitrano testified that he works out of his home in New Hampshire; that he has no secretary or legal assistant, and that he does his own typing. Typing time was billed also At $190 per hour, which Mr. Mitrano justifies by contending that as he types he is "thinking about the case".

Mr. Mitrano's only evidence of fees presented to the jury was the claim of $235,000. He failed to present any evidence of the time devoted solely to the collection of the contract balance, nor did he offer any evidence of the amount of clerical time spent typing the various papers, which are voluminous. He presented no evidence that $190 is a reasonable hourly rate under the circumstances in Westmoreland County.

After plaintiff rested, and at the conclusion of all the evidence, the defendant moved to strike the claim for attorney's fees, which motion was

taken under advisement. The jury awarded $20,000 in attorney's fees.

This award can only be based on guesswork or speculation. The jury had no evidence whatever of the amount of time devoted by Mr. Mitrano solely to the pursuit of the contract balance. The motion to strike the claim of attorney's fees previously taken under advisement is granted, and the jury's award will be set aside.

III

SANCTIONS UNDER (Section) 8.01-271.1

Finally, the Town has asked for sanctions pursuant to Virginia Code (Section)8.01-271.1 against Melka and its attorney.

This is an unpleasant matter for the Court to address.

In considering this issue, it must be borne in mind that this was a rather uncomplicated action on a contract in which there was a single, straightforward issue: had Melka performed the contract. Even the counterclaim involved the same issue.

What was and should have remained a relatively minor dispute has been escalated into a

proceeding far out of proportion to what was at stake.

Mr. Mitrano's pretrial activity was voracious. He submitted three separate sets of interrogatories; he propounded a total of 329 requests for admissions. Depositions extended over days. (On one occasion during which the Town was attempting to depose a Melka witness, the Town complained that Mr. Mitrano interposed an excessive number of objections and indeed had dialogue and objections on 236 pages out of a total of 283 pages.) Mr. Mitrano filed approximately 20 pretrial motions. They will not all be listed here but a sampling will be instructive.

The case was initially filed in Fairfax County. The Town moved to transfer venue and the file the Fairfax Court graciously obliged. The file reached Westmoreland on January 31, 1994. On February 4, 1994, Melka filed a Motion for Summary Judgment and two Motions to Compel. On February 8, Mr. Mitrano moved for Judgment on Affidavit. On February 14, he moved for reconsideration of the order changing venue.

Thus begun, the parties have been trudging through seemingly endless series of motions and hearings with unrelenting regularity ever since.

The defendant filed a request for a date certain to file responsive pleadings. Melka objected. When dates were set, Melka filed a motion to vacate the order. When the Town moved to have someone designated to speak for the plaintiff corporation, Mr. Mitrano objected, having himself made the same request of the Town. On May 18, 1994, Mr. Mitrano filed a "Motion for Order that defendant's counsel refrain from kicking witness while testifying". And so it went.

The Court, of course, has some responsibility for the orderly processing of cases pending on its docket. In this matter, we had a number of pretrial hearings, during which counsel were often reminded of the need for reasonableness. But once set in motion, it seemed well-nigh impossible to contain the course of this litigation.

In October, 1991, I wrote to counsel, noting in rather an understatement that the case is "somewhat out of hand". Counsel was undaunted.

In December, 1994, counsel were before me in chambers for a hearing on additional motions.

Following that session, I again reminded counsel of what was at stake and requested that they each review the matter and consider a realistic settlement. The Town had indicated its willingness to settle throughout, rather than to continue to incur mounting legal costs. Following this meeting in chambers, on February 16, 1995, Mr. Mitrano wrote to Mr. Saunders, counsel for the Town, offering to settle for $483,477.56. Mr. Saunders filed this letter with the court as an "other paper" signed by counsel within the scope of (Section) 8.01-271.1. Included in Mr. Mitrano's settlement demand were the $64,775 contract balance, the $168,879 "additional costs" claim which had been previously struck, attorney's fees of $97,603, interest, plus additional attorney's fees "projected through signing of settlement of $115,000".

Thus, the Town, approximately two months before trial, faced with a maximum exposure of $64,775 plus reasonable attorney's fees, is asked by Mr. Mitrano for $483,477.56 to settle the case.

Upon being notified of this development, the Court wrote counsel on March 8: " ... Given what is at stake in this case, and what has transpired

thus far, it is reasonable to expect that sanctions will be awarded." Further: "I ask you both to make known to your clients, if you have not already done so, these views of the Court, so that if and when sanctions are awarded, no one will be surprised."

It was apparent to the Court from the early stages that from Melka's perspective this proceeding was more about attorneys fees than about the contract, and this is, in my opinion, the source of the problem.

There can be no rational justification for much that Melka and Mr. Mitrano have done in handling this case. By any objective standard, a substantial part of their effort has been unnecessary and unreasonable. The case file is approximately two feet thick, compelling evidence of overkill. Whatever the intended purpose of this strategy may have been, its primary consequence has been to needlessly increase the cost of this litigation. Mr. Mitrano's personal testimony, under oath, of the fees he himself claimed to have incurred establishes, beyond any doubt, this fact.

The Court finds that Melka Marine, Inc. and Mr. Mitrano as its counsel have violated both the

letter and the spirit of (Section) 8.01-271.1, by needlessly increasing the cost of this litigation, I find that both are equally complicitous. Counsel for the Town have in no way provoked or otherwise been responsible for the plaintiff's activities complained of. Indeed, counsel for the Town have demonstrated at times remarkable forbearance.

Therefore, sanctions should be awarded against both Melka and Mr. Mitrano, in favor of the Town. The Town has complained that it has expended approximately $120,000 in defense of this $65,000 case. It estimates, modestly in my view, that at least $30,000 was directly attributable to Melka's oppressive tactics.

To a citizenry already skeptical and perhaps at times disillusioned with our system of justice, the tactics employed in this case by the plaintiff and its counsel give encouragement to those who would hold our profession and our system up to scorn and ridicule. Such tactics must not be tolerated.

For these reasons, sanctions pursuant to (Section) 8.01-271.1 are awarded in favor of the

Town against Melka and Mr. Mitrano in the amount of $30,000.

Mr. Saunders will kindly prepare and circulate a sketch order consistent with the foregoing.

With best wishes, I am

Sincerely,

Joseph E. Spruill, Jr.

JESjr/ala

cc: Mrs. Doris R. Moss, Clerk

# SUPREME COURT OF VIRGINIA

## No. 951741

Melka Marine, Inc.,

Appellant,

versus

Town of Colonial Beach,

Appellee.

Date of Entry: January 19, 1996

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## ORDER

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VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Friday *the* 19th *day of* January, 1996.

Melka Marine, Inc.,

Appellant,

against Record No. 951741

Circuit Court No. L94-6

. Town of Colonial Beach,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 17th day of November, 1995 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ David B. Beach

Clerk